SUPREME COURT, U. S.

FILED
MAR 3 1970
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER

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INDEX

PAGE

Opinion Below 1
Jurisdiction 1
Constitutional Provisions Involved 2
Statute and Regulations Involved 2
Questions Presented 2
Statement of the Case 3
Summary of Argument 8
Argument:
I. The Court Below Erred in Holding that the Petitioner's Selective Service Local Board Neither Abused Its Discretion in Refusing to Reopen His Classification under 32 C.F.R. Section 1625.4, Nor Did It Reopen His Classification in Fact Within the Meaning of 32 C.F.R. Section 1625.2. In So Holding It Erred Further in That It Permitted the Board to Engage in Evaluative Consideration of All the Information in His File under the Guise of Determining Whether the New Information Submitted, If True, Would Entitle Him to Classification as a Conscientious Objector 11
A. The Petitioner Made Out a Prima Facie Case for Classification as a Conscientious Objector 12
B. The Board Engaged in Evaluative Consideration of the Claim on the Merits under the Guise of Determining that the Petitioner Did Not Make out a Prima Facie Case 18
C. The Approach of the Court of Appeals for the Sixth Circuit to Judicial Review of a Board's Refusal to Reopen a Classification is Clearly Erroneous 22

D. The Government's Own Arguments, Which Have Shifted at Every Stage of the Litigation, Demonstrate That the Board Either Abused Its Discretion by Failing to Reopen or That It Reopened in Fact 28

II. The Court Below Erred in Its Conclusion That the Petitioner Did Not Make Out a Prima Facie Case for Classification as a Conscientious Objector, Because His Objection to Serving in the Armed Forces Was Based on "Essentially Political, Sociological or Philosophical Views and His Conscience Rather Than on Religious Training and Belief 30

A. The Court Failed to Recognize That a Person Whose Religious Beliefs May Cause Him to Engage in Political Activity, Including Resistance to War and Military Service, Is Still Entitled to Classification as a Conscientious Objector so long as His Opposition to War Is, in Part, Based upon Religious Belief 30

B. Congress May Not Constitutionally Limit the Conscientious Objector Exemption to Those Whose Opposition to War Is Based upon Religious Training and Belief 37

III. The Fact That the Petitioner Was Denied the Opportunity for Full Review of His Claim for Classification as a Conscientious Objector, Including Review by an Appeals Board, When Such Claim Was Presented for the First Time, Constitutes a Violation of Due Process of Law, as Guaranteed by the Fifth Amendment 39

PAGE

IV. The Petitioner Was Denied Due Process of Law, as Guaranteed by the Fifth Amendment, in That His Claim for Classification as a Conscientious Objector Was Not Given Full and Fair Consideration by His Selective Service Local Board 42

A. The Members of Petitioner's Board Refused to Give Full and Fair Consideration to His Claim, in Particular, By Refusing to Read with Some Care His Detailed Answers to SSS Form 150 42

B. The Members of Petitioner's Board Lacked a Minimum Understanding of the Applicable Statute and Regulations, and Thus Were Unable to Pass Intelligently on His Claim for Classification as a Conscientious Objector 47

Conclusion 49

Appendix A 1a-7a

CASES CITED

PAGE

Bejelis v. United States, 206 F.2d 354 (6th Cir., 1953) 42
Blalock v. United States, 247 F.2d 615 (4th Cir., 1957) 46
Bolling v. Sharpe, 347 U.S. 497 (1954) 40, 41
Davis v. United States, 410 F.2d 89 (8th Cir., 1969) .....
.....14, 15, 17, 26
Douglas v. California, 372 U.S. 353 (1963) 40
Fleming v. United States, 344 F.2d 912 (10th Cir., 1965) 35, 37
Gatchell v. United States, 378 F.2d 287 (9th Cir., 1967) ...21
Griffin v. Illinois, 351 U.S. 12 (1956) 40
Howze v. United States, 409 F.2d 27 (9th Cir., 1969) ..24, 26
Keene v. United States, 266 F.2d 378 (10th Cir., 1959) 17
Klubnikian v. United States, 227 F.2d 87 (9th Cir., 1955),
cert. denied, 350 U.S. 975 (1956) 40
McKart v. United States, 395 U.S. 185 (1969) 17
McSurely v. Ratliff, 282 F.Supp. 848 (E.D.Ky. 1967) ...4, 33
Miller v. United States, 388 f.2d 973 (9th Cir., 1967) .....
.....19, 21, 27, 41
Morgan v. United States, 289 U.S. 468 (1936) 42
Ohio Bell Telephone Co. v. Public Utilities Commission of
Ohio, 301 U.S. 292 (1937) 45
Petrie v. United States, 407 F.2d 267 (9th Cir., 1969) ..23, 24
Robertson v. United States, 404 F.2d 1141, 417 F.2d 440
(5th Cir., 1969) 21
Schneider v. Rusk, 377 U.S. 163 (1964) 40, 41
Sicurella v. United States, 348 U.S. 385 (1955) 31, 34, 37
Simmons v. United States, 348 U.S. 397 (1955) 36
Stain v. United States, 235 F.2d 339 (9th Cir., 1956) 17
Taffs v. United States, 208 F.2d 329 (8th Cir., 1953), *cert.*
denied, 347 U.S. 928 (1954) 48

PAGE

United States v. Beaver, 309 F.2d 273 (4th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963) 17, 40
United States v. Freeman, 388 F.2d 246 (7th Cir., 1967) 14, 17, 24, 25, 26
United States v. Gearey, 368 F.2d 145 (2nd Cir., 1966) 47
United States v. Grier, 415 F.2d 1098 (4th Cir., 1969) 27
United States v. Longworth, 269 F.Supp. 971 (S.D. Ohio 1967) 24
United States v Seeger, 380 U.S. 163 (1965) 26
United States v. Sisson, pending on direct appeal, No. 305 this Term 38
Welsh v. United States, No. 76, this Term, certiorari granted, October 13, 1969 38
Witmer v. United States, 348 U.S. 375 (1955) 23
Zenith International Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir., 1961) 45

UNITED STATES CONSTITUTION CITED

First Amendment 2
Fifth Amendment 2, 3, 39, 42

STATUTES CITED

28 U.S.C. Section 1254 (1) 2
50 App. U.S.C. Section 456(j) 2, 15
50 App. U.S.C. Section 462(a) 2, 3
Kentucky Rev. Stat. 432.040 4

REGULATIONS CITED

PAGE

32 C.F.R. Section 1622.10 46
32 C.F.R. Section 1625.1(a) 15, 16
32 C.F.R. Section 1625.1(b) 17
32 C.F.R. Section 1625.1(c) 27
32 C.F.R. Section 1625.2 ...2, 8, 9, 11, 12, 15, 16, 17, 21, 41
32 C.F.R. Section 1625.4 .....
.....2, 8, 11, 12, 16, 17, 19, 21, 25, 39, 40, 41
32 C.F.R. Section 1625.11 .....16, 41
32 C.F.R. Section 1625.13 .....2, 11, 12, 16, 19, 22
32 C.F.R. Section 1660.1 36

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (A. 3-13) is reported at 412 F.2d 421. A petition for rehearing was denied without opinion. Petitioner was tried in the District Court by a jury and there is no opinion of that Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 10, 1969. A petition for rehearing was denied on August 29, 1969. The petition for a writ of certiorari was filed on September 25, 1969, and was granted on January 19, 1970. The

jurisdiction of this Court rests on 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall pass no law respecting the establishment of religion or prohibiting the free exercise thereof;***"

Amendment V

"No person shall *** be deprived of life, liberty, or property, without due process of law***."

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Military Selective Service Act of 1967, 50 App. U.S.C. Sections 451 et seq. The relevant provisions are 50 App. U.S.C. Sections 456 (j), 462 (a). The regulations involved are Selective Service Regulations, part 1625, 32 C.F.R. Ch. XVI. Because these provisions are lengthy, their pertinent text is set forth as Appendix A.

QUESTIONS PRESENTED.

1. Did the Court below err in holding that the petitioner's selective service local board neither abused its discretion in refusing to reopen his classification under 32 C.F.R. Section 1625.4, nor did it reopen his classification in fact within the meaning of 32 C.F.R. Section 1625.2, so as to entitle him to an administrative appeal as provided in 32 C.F.R. Section 1625.13? And in so holding, did it err further in that it permitted the board to engage in evaluative consideration of all the information in the petitioner's file under the guise of

determining whether the new information submitted by the petitioner, if true, would entitle him to classification as a conscientious objector?

2. Did the Court below err in its conclusion that the petitioner did not make out a prima facie case for classification as a conscientious objector, because his objection to serving in the Armed Forces was based on "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief?"

3. Does the fact that the petitioner was denied the opportunity for full review of his claim for classification as a conscientious objector, including review by an appeals board, when such claim was presented for the first time, constitute a violation of due process of law, as guaranteed by the Fifth Amendment?

4. Was the petitioner denied due process of law, as guaranteed by the Fifth Amendment, in that his claim for classification as a conscientious objector was not given full and fair consideration by his selective service local board, because the members of said board refused to give such consideration to his claim and/or because they lacked the competency and understanding of the applicable statute and regulations to pass intelligently on said claim?

STATEMENT OF THE CASE.

Petitioner was convicted in the United States District Court for the Western District of Kentucky for wilfully refusing to submit to induction into the Armed Forces, in violation of 50 App. U.S.C. Section 462 (a). A sentence of five years' imprisonment and a fine of $10,000 were imposed. Petitioner had requested classification as a conscientious objector (Class 1-0), and the questions presented for review in this case arise out of the stated refusal of his selective service local board to

reopen his classification of 1-A and to consider on the merits his claim for classification in Class 1-0.

Prior to March 17, 1966, petitioner had been classified in Class 2-S (college student), and from that date until May 11, 1967, he was granted an occupational deferment to work with the Appalachian Volunteers, an anti-poverty organization working in Eastern Kentucky. On May 11, 1967 he was placed in Class 1-A, and he appealed from that classification. He was ordered to report for a physical examination on June 26, 1967, and was found to be physically acceptable. He was then ordered to report for induction on July 17, 1967. This order was cancelled, since his appeal had not yet been determined by the Appeals Board. On August 16, 1967, the Appeals Board classified him in Class 1-A by a vote of 5-0.

Petitioner and others had been engaged in organizing activities among the poor in Eastern Kentucky and in leading the opposition to strip mining that was taking place there. On August 11, 1967, petitioner and others were arrested in Pike County on a charge of "teaching sedition" and "advocating the overthrow of the government of Pike County." The arrest and threatened prosecution were found by a three-judge United States District Court to have been undertaken in part for the purpose of stopping organizing activities in Pike County. The Court also held that the statute in question, Kentucky Revised Statutes 432.040, was unconstitutional on its face and enjoined any prosecution under it. *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D.Ky. 1967). On September 5 1967, petitioner advised his local board that he was under bail to the federal court in connection with the above case (the right of the defendants in that action to appeal did not expire until November 17, 1967) and under bail to the Pike Circuit Court on a charge of flourishing a deadly weapon (that charge was subsequently dismissed). On September 21, 1967, the board issued an order

to report for induction which was cancelled on October 12, 1967.

Following his arrest and the proceedings in federal and state courts, the petitioner's beliefs as to conscientious objection to participation in war came to maturity, and on October 17, 1967, he wrote a letter to the board stating that "after much, much thinking, seeking, and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector and I am therefore opposed to war in any form." (A. 41). He was then sent the Special Form for Conscientious Objectors (SSS Form 150), which he returned on October 26, 1967. He gave detailed answers to the questions on the form, stating among other things that he believed in a Supreme Being and that his religious training taught him that it was "against God's law to kill." He further stated that to be a member of the Armed Forces of any country would oblige him to kill or indirectly assist in killing. (A. 19). Various letters supporting his claim were sent to the board, including a letter from a Catholic priest. (A. 51).

At the time that he submitted the completed form, petitioner also requested in writing a personal appearance before the board. He was advised that although he was not entitled to an interview, the board would grant him a "courtesy interview." This interview took place on November 9, 1967, and lasted between ten and fifteen minutes. (A. 77). The Chairman of the board stated "at that time the Board came to the conclusion that there was no merit to his contention that he was entitled to conscientious objector status." An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened." (A. 14). The board, however, did not take a vote at the meeting of November 9th. On November 12, 1967, petitioner wrote a letter to the board setting forth his views more fully (A. 58). It was this letter which, according to

the Court of Appeals, "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F. 2d at 425

On January 11, 1968, the board formally considered petitioner's claim for classification, and by a vote of 4-0 took the following action as noted in the Classification Questionnaire: "All information in file was considered including claim of Conscientious Objector. All Members present felt this information did not warrant re-opening of 1A class." (A. 14). On January 21 petitioner wrote to the board, appealing from the board's failure to reclassify him in Class 1-0 stating that he considered his case to have been reopened. The board wrote in reply two days later that it did not consider his case to have been reopened and that he had no right to appeal. (A. 64, 65). On the same date he received an order to report for induction on February 23, 1968.

On February 8, 1968, appellant filed a civil action in the United States District Court for the Western District of Kentucky, seeking to enjoin his induction into the Armed Forces on the ground that the order to report for induction was void, as having been issued in violation of applicable Selective Service Regulations and in such circumstances as to violative of due process of law. On February 16, 1968, the Court dismissed his complaint and denied relief. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on February 16, 1968, together with a motion for an interlocutory injunction pending appeal. The latter motion was denied on February 22, 1968. On February 23, 1968, the petitioner refused to submit to induction into the Armed Forces. The appeal in the civil case was dismissed as moot by the Court of Appeals on May 2, 1968.

The petitioner was indicted by the grand jury on March 11, 1968. He was arraigned on March 18, 1968, at which time he pleaded not guilty and further moved that the indictment be dismissed on the ground, inter alia, that "The Order to Report for Induction, the refusal to obey which forms the basis of said indictment, is illegal, void and of no effect, because it was issued in violation of the applicable statutes and regulations, and further because it was issued in such circumstances so as to deprive the defendant of due process of law." It was stipulated by counsel for the petitioner and counsel for the government that the record of the proceedings in the petitioner's civil suit should form a part of the record in the criminal proceeding. On March 22, 1968, the District Court entered an order overruling the petitioner's motion. The Court also stated that it had read the selective service file of the petitioner and the transcript of the hearing in the civil suit, as a result of which it concluded that there was a reasonable basis in fact for the classification of the petitioner and that the actions of the board were proper in all respects.

The case was tried before a jury on April 5, 1968. At the conclusion of the government's case counsel for the petitioner moved for a judgment of acquittal, which was overruled. Counsel for the petitioner then presented his case and called as witnesses the four members of the petitioner's selective service local board. Following the examination of said witnesses, counsel moved for a judgment of acquittal on the ground that the testimony of board members showed conclusively that the petitioner had been denied a full and fair hearing and that the demonstrated incompetence of the members of the board in passing on the petitioner's claim for classification as a conscientious objector constituted a denial of due process. This motion was overruled. At the conclusion of the petitioner's case, the motion was renewed together with a written motion for

acquittal, filed by petitioner's counsel that day. All said motions were overruled. The jury returned a verdict of guilty, and sentence was imposed on April 8, 1968.

The petitioner appealed his conviction to the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT.

I. The Petitioner's Selective Service Local Board either abused its discretion in refusing to reopen his classification under 32 C.F.R. Section 1625.4, or it reopened his classification in fact within the meaning of 32 C.F.R. Section 1625.2. The petitioner made out a prima facie case for classification as a conscientious objector on the basis of the information supplied in his SSS Form 150 and the supporting letters. The board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. In such circumstances a reopening was clearly required.

The board concluded that the petitioner was not a "genuine conscientious objector," because what he really wanted was an occupational deferment to enable him to continue his work among the poor. The Court of Appeals also sustained the action of the board on the ground that the petitioner's opposition to war was "based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." Either conclusion could only be arrived at by evaluative consideration of all the information in the file and by determining the merits of the claim. Such evaluative consideration constitutes a reopening in fact, entitling the petitioner to an administrative appeal, which was denied to him by the board. The action of the Court of Appeals, if permitted to stand, completely obliterates any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial

of the classification on the merits after a reopening under Section 1625.2.

The Court of Appeals for the Sixth Circuit, unlike all other Courts of Appeal that have passed on the question, is applying the "basis in fact" test applicable to judicial review of a board's final determination on the merits to review of the board's determination that the registrant did not make out a prima facie case. This is clearly erroneous, since it means that the power of the courts to determine procedural fairness is no different from their power to determine the substantive validity of the classification. The Sixth Circuit also stands alone in holding that in determining whether the registrant has made out a prima facie case for reopening the board can consider and evaluate all the information in the registrant's file against the new evidence which he has submitted in support of his claim.

In the case at bar the line between a refusal to reopen on the ground that the registrant has failed to make out a prima facie case and a denial of the classification on the merits after a reopening has been totally destroyed. There is nothing more the board could have done and no further information it could have considered if it had in fact reopened the classification. The government's own arguments, which have shifted at every stage of the litigation, demonstrate the point conclusively.

II. In concluding that the petitioner's opposition to war was not based on religious training and belief, the Court of Appeals failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector. Nor is a manifestation of those beliefs by working with the poor inconsistent with a claim of conscientious objection. Certainly it does not justify the conclusion that he really wanted an occupational deferment rather than classification as a conscientious objector.

Alternatively, even if a registrant's opposition to war was not based upon religious training and belief, so long as the requisite objection to war exists, he may not constitutionally be denied classification as a conscientious objector.

III. If it is held that the board may engage in evaluative consideration of the petitioner's claim on the merits without thereby reopening his classification, the resultant denial of full review, including review by an appeals board, is discriminatory and violative of due process. If the board refuses to reopen, there is no appeal, notwithstanding that the claim was made for the first time. At the same time registrants whose claim was made at the time of their original classification or whose classification was reopened and their claim denied on the merits do have the right of appeal. All have presented their claims for the first time after the facts entitling them to such status have matured. To allow two of them to appeal while denying the right of appeal to the third constitutes impermissible discrimination between prima facie situations of legal equality "so unjustifiable as to be a denial of due process."

IV. The Petitioner was denied due process of law in that his claim for classification as a conscientious objector was not given full and fair consideration by his selective service local board. The members of the board only looked at his file, if at all, immediately prior to the "courtesy interview." The file was "scanned" at best, and no member carefully read in particular the detailed answers contained in his SSS Form 150, on which his claim of conscientious objection was based. Clearly this cannot constitute full and fair consideration of his claim, as is required by administrative due process.

The members of the petitioner's local board lacked a minimum understanding of the applicable statute and regulations and thus were unable to pass intelligently on his claim for classification as a conscientious objector. The Clerk testified that no registrant had ever been assigned to civilian work as a

conscientious objector in her seventeen years with the board, and there is doubt if the classification had ever been given. The answers of the board members to basic questions about conscientious objection clearly demonstrated "administrative incompetence," and to allow a board so constituted to pass on petitioner's request in itself amounts to a denial of due process of law.

ARGUMENT

I

The Court below Erred in Holding that the Petitioner's Selective Service Local Board Neither Abused Its Discretion in Refusing to Reopen His Classification under 32 C.F.R. Section 1625.4, Nor Did It Reopen His Classification in Fact Within the Meaning of 32 C.F.R. Section 1625.2. In So Holding It Erred Further in That It Permitted the Board to Engage in Evaluative Consideration of All the Information in His File under the Guise of Determining Whether the New Information Submitted, If True, Would Entitle Him to Classification as a Conscientious Objector.

Throughout these proceedings the essential contention of the petitioner has been that in the circumstances of this case either the board was required to reopen his classification and consider his claim of conscientious objection on the merits or that, in fact, the board did reopen his classification, rejecting the claim on the merits, but denying the petitioner the administrative appeal to which he was entitled under 32 C.F.R. Section 1625.13. The board took the position that the petitioner did not make out a prima facie case for classification as a conscientious objector, but, as the record clearly indicates, it reached that conclusion only by considering all the information in his file and evaluating the information favorable to the claim against the information that, in its opinion, did not support it.

The Court of Appeals agreed with that position, holding that the board was not required to reopen his classification because, based upon its consideration of all the information in his file, it could conclude that he had not made out a prima facie case. What the board did, and what the Court of Appeals permitted it to do, was to engage in an *evaluative consideration* of the petitioner's claim, so that it rejected the claim on the merits without giving petitioner the administrative appeal to which he was entitled under 32 C.F.R. Section 1625.13. The decision of the Court of Appeals, if allowed to stand, completely obliterates any distinction between a refusal to reopen under 32 C.F.R. 1625.4 and a denial of the classification on the merits after a reopening under 32 C.F.R. Section 1625.2. In effect, the board can deny a registrant's claim on the merits under the guise of finding that he did not make out a prima facie case, and the provisions of 32 C.F.R. Section 1625.13, authorizing an administrative appeal after a reopening and a denial on the merits, will become meaningless.

A. The Petitioner Made Out a Prima Facie Case for Classification As A Conscientious Objector.

The answers contained in petitioner's SSS Form 150 clearly make out a prima facie case of opposition to war on the basis of religious training and belief. The form is set out in full in the Appendix, pp. 15-23, but the following excerpts should indicate that the test of prima facie sufficiency was satisfied. The petitioner stated that he believed in a Supreme Being and that:

> "My religious training taught me that it is against God's law to kill. To be a member of the armed forces of this country or any other would oblige me to either kill or indirectly assist in killing. I also believe that the message of Jesus is love for all mankind. We as his children are to imitate Jesus' love for men."

* * * * * *

> "As a young man I was not taught to be against the use of violence as such. But I was taught not to kill and love all men. This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO." (A. 19,22).

The petitioner explained in detail his religious training and experience and stated that he was most influenced by Father Thomas Merton and by the teachings of Jesus Christ. (A. 22). The board was also in receipt of a letter from a Catholic priest supporting the petitioner's request and attesting to his sincerity. (A. 51).

The board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. (A. 71, 72, 84, 86). It is important to emphasize the board's acceptance of the petitioner's veracity and its assumption of his sincerity, because the government is now contending that the board was justified in refusing to reopen precisely because it had reason to question the truth or sincerity of the petitioner's representations. (Brief for the United States in Opposition to Certiorari, p. 19). That argument marks a significant departure from the government's position, which heretofore had been that *since the board assumed petitioner's sincerity and veracity, it did not, in fact, reopen his classification.* Be that as it may, the record clearly demonstrates that the board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. This is brought out in the following dialogue between the government's attorney at the trial, Mr. Huddleston, and board member Wolking:

> Q. As I understand it then, you did not inquire into his sincerity, but the prima facie case that he presented?
>
> A. That is quite true.
>
> Q. Assuming that he was since?
>
> A. *We* assumed he was sincere, that's right. (Emphasis added).
>
> (A. 84).

Board member Wolking, following the lead of the government's attorney and presumably speaking for the board collectively, said that the board never inquired into the petitioner's sincerity. It is true, as the government argues in its opposition brief, that only two members of the board, Mr. Wolking and Board Chairman Sherman, testified on this point. But as the above indicates, they were speaking for the board collectively, and since the government heretofore had been arguing that the board assumed the petitioner's sincerity and veracity, the failure to obtain this admission from the other board members (either by the government or by defense counsel) should be understandable. There is not a shred of evidence in the record indicating that any board member did not assume that the petitioner was truthful in his representations and sincere in his beliefs.

Despite the prima facie sufficiency of the statements contained in Petitioner's SSS Form 150 and in the supporting letters and despite the fact that the board members accepted everything that the petitioner said as true and assumed that he was sincere in his beliefs, it took the position that the petitioner "still did not make out a case for conscientious objection, and therefore, we saw no reason to reopen the case, because it wasn't there." (A. 71). This, in the view of the Court of Appeals, did not constitute an abuse of discretion. Its decision on this point is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967), and with the decision of the Court of Appeals for the Eighth Circuit in *Davis v. United States*, 410 F.2d 89 (8th Cir., 1969). In *Freeman*, the defendant gave rather sketchy answers to the questions contained in SSS Form 150. However, he did state that he believed in a Supreme Being, that he was a member of the Islam religion, and that by reason of his religious beliefs he was opposed to participation in

war in any form. There was nothing more, and according to Judge Koch, dissenting, "Most of this data comes from statements appearing in printed form which were adopted by the defendant by check mark or signature." 388 F.2d at 250. The Court held that what he had stated was sufficient to make out a prima facie case for classification as a conscientious objector, "since he presented new information in SSS Form 150 which, if true, entitled him to reclassification." The conviction, therefore, was reversed. In *Davis,* where the facts were very similar to the facts in the case at bar, the Court observed:

> "Davis' statements, taken from his Selective Service Form 150 . . . , if taken as true, demonstrate that he is conscientiously opposed to participation in war in any form and that his objection is based on religious training and belief. Accompanying his conscientious objector Form 150 was a letter from his pastor . . . These statements, if accepted at face value, constitute a prima facie case for the conscientious objector classification as specified in 50 U.S.C. App. Section 456(j). The local board was therefore required to reopen his classification. 32 C.F.R. Section 1625.2. . . ." 410. F.2d at 94-5.

If it was an abuse of discretion for the board to refuse to reopen in these cases, it was clearly an abuse of discretion for the board to refuse to reopen in the case at bar in view of the information that the present petitioner furnished in response to the questions contained in SSS Form 150 and in the supporting letters.

It is submitted that the approach taken by the other Courts of Appeal to the matter of making out a prima facie case for classification as a conscientious objector is clearly correct. The very nature of classification under the present Selective Service Act presupposes that changes will occur with some frequency. No classification of a registrant is permanent. 32 C.F.R. Section

1625.1(a). At any time the board may reopen and consider anew the classification of a registrant either upon his request or upon his own motion if it is in the possession of facts "not considered when the registrant was classified which, if true, would justify a change in the registrant's classification." 32 C.F.R. Section 1625.2. The only time that the board is precluded from reopening the registrant's classification (other than after the issuance of a valid order to report for induction) is where the new facts, even if true, would not justify a change in the classification. 32 C.F.R. Section 1625.4. Whenever the classification is reopened it is if the registrant had never been classified before, 32 C.F.R. Section 1625.11, and following the reopening the registrant has the same right of personal appearance before the board and the same right of appeal as in the case of an original classification. 32 C.F.R. Section 1625.13.

The Court of Appeals took the position that the board has "discretion" under Section 1625.2 to determine whether or not it will reopen a classification, but that it is mandatory for the board to refuse to reopen under Section 1625.4 where the new facts, even if true, would not justify a change in the classification. 412 F.2d at 424. The government also argues Section 1625.2 does not "impose a command even where a prima facie case for reclassification is made out." (Brief for the United States in Opposition to Certiorari, p. 19). The other Courts of Appeal, however, have never recognized any authority in the board to refuse to reopen whenever a prima facie case has been made out. The clear import of Section 1625.2 and 1625.4, taken altogether, and read in the light of the other provisions of Part 1625 dealing with the procedure for reclassification, is that the board must reopen the classification whenever the new facts if true would justify a change in the classification. The only justification for refusing to reopen would be that contained in the regulations themselves, such as where the new facts, even if

true, would not entitle the registrant to the claimed classification, Section 1625.4, or where the new facts came to being after the issuance of a valid order to report for induction and were not due to circumstances beyond the registrant's control, Section 1625.2, and perhaps where the registrant has failed to reasonably inform the board of the new facts, as required by Section 1625.1 (b). See *Keene v. United States*, 266 F.2d 378 (10th Cir., 1959); *United States v. Beaver*, 309 F.2d 273 (4th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963). But *c.f. McKart v. United States*, 395 U.S. 185 (1969). There is nothing in the regulations nor in the heretofore existing decisional law interpreting them to indicate that there is a hiatus in the provisions, so that the board may refuse to repoen even though a prima facie case has been established. Whenever the registrant has made out a prima facie case on the basis of the new facts presented, reopening is required, and the refusal to reopen is necessarily arbitrary and violative of the due process of law. *Stain v. United States*, 235 F.2d 339 (9th Cir., 1956); *United States v. Freeman, supra; Davis v. United States, supra.*

The present petitioner clearly made out a prima facie case for classification as a conscientious objector based on his answers to the questions contained in SSS Form 150 and the supporting letters. If the board had any doubts as to the truth of those statements or the sincerity of the petitioner's beliefs, the proper way to resolve those doubts was to reopen the classification and consider the request on the merits. In no way could it possibly be said that the "new facts, even if true, did not entitle petitioner to the claimed classification." The refusal to reopen in these circumstances constitutes a most flagrant abuse of discretion and cannot be permitted to stand.

B. The Board Engaged in Evaluative Consideration of the Claim on the Merits under the Guise of Determining that the Petitioner Did Not Make out a Prima Facie Case.

Even the government is willing to concede that the "new information which petitioner presented in the representations made in Form 150 and the accompanying letters did present a prima facie showing that he met the statutory conscientious objector standard." (Brief of the United States in Opposition to Certiorari, p. 18). This was *not* the view of the Court of Appeals, which explicitly stated why, in its opinion, the board did not abuse its discretion in denying petitioner's request to reopen:

> "In our judgment, he did not make out a *prima facie* case of conscientious objection, and the additional information that he supplied did not justify a change in his classification." 414 F.2d at 426.

The board took the position that the petitioner did not make out a prima facie case for classification as a conscientious objector because what he was really seeking was an occupational deferment. (A. 71, 74, 84). The Court of Appeals noted this fact and further observed that the petitioner's objection to serving in the Armed Forces was "based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." This fact was said to have been "rather clearly indicated" from the letter of November 12, 1967, which he sent to the board. 412 F.2d at 425.

However, it was never denied by the Court of Appeals that the petitioner presented at least some facts—at a minimum his answers to the SSS Form 150 and the supporting letters—which, if true, would have entitled him to be classified as a conscientious objector. The conclusion that the petitioner really wanted an occupational deferment or that his opposition to the war was not based on religious training and belief could be reached only

by the evaluation of all other information in his file. Such an evaluation constitutes a determination of the claim on the merits, a weighing of seemingly contradictory information and the drawing of inferences from such information. When a board has engaged in this kind of determination, it cannot be heard to say that "the new facts, if true, would not justify a change in the registrant's classification" within the meaning of 32 C.F.R. Section 1625.4. What the board has done is to conclude that the new facts, when considered in light of other facts and evaluated against those facts, would not justify a change in the registrant's classification. By so doing, it has reopened the classification, and the registrant is entitled to an administrative appeal, as provided in 32 C.F.R. Section 1625.13.

In the case at bar the Court of Appeals, held that the board *could* engage in such evaluative consideration, based upon all the information in the petitioner's file (as opposed to the new information submitted by the petitioner in support of his claim for reclassification), without thereby reopening the classification so as to entitle the registrant to an administrative appeal. That holding is directly in conflict with the holding of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). In that case the appellant had been classified I-A and had passed his pre-induction physical. Less than a month later he wrote a letter to the board claiming to have become a conscientious objector. He completed the SSS Form 150, and after an improper order to report for induction had been cancelled, the board proceeded to consider his request for a reopening of his classification. The board refused to reopen on the ground that "the information submitted did not warrant reopening of the classification." It noted that he had previously applied for enlistment in a reserve program, for which he had not been accepted, and as a result it was "the opinion of the board that the registrant was seeking to

avoid induction." In reversing the conviction for refusal to submit to induction, the Court stated:

> "It cannot be held that the statements and information in appellant's letter and executed form No. 150, if true, would not be able to provide basis for a conscientious objector classification and so could not justify a consideration of the question of change in his classification. . . . what the board actually did, as the implications of its minutes reflect, was to engage in evaluative consideration and judgment that, regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation, entitled to credence in fact . . .
>
> [T]he local board did not deal with the alleged facts or evidence of appellant's conscientious objector form as a question of whether this legally could provide basis for a reopening to be made, so as to entitle consideration and evaluation to be engaged in thereafter under the general classification procedure of the regulations. It shortcut the consideration of whether appellant was entitled to a conscientious objector classification on the merits of the probative elements of its file. It weighed the information contained in the appellant's form against other probative factors (such as his attempted reserve enlistment during the month preceding) and arrived at the judgment that he was not in truth a conscientious objector but was merely seeking to avoid induction." 388 F.2d at 973, 976.

In the case at bar the board weighed the information contained in petitioner's SSS Form 150 and in the supporting letters he submitted against other probative factors based on the information contained in his entire file, principally his previous claim for an occupational deferment, and concluded that he was not "in truth a conscientious objector but an anti-poverty

worker seeking to avoid induction under the guise of being a conscientious objector." The Court of Appeals sanctioned such evaluative consideration and engaged in it on its own by weighing the information contained in the SSS Form 150 and supporting letters against other information, concluding that the petitioner's opposition to war was not based on religious training and belief, as he contended, but upon "essentially political, sociological or philosophical views and his conscience." And it did so despite the fact that the action of the board must be supported on the grounds that the board gave for such action. *Gatchell v. United States*, 378 F.2d 287 (9th Cir., 1967). Its decision is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States, supra.*[1]

What the Court of Appeals is doing is to completely obliterate any distinction between a refusal to reopen under 32 C.F.R. Section 1625.4 and a denial of the classification on the merits after a reopening under 32 C.F.R. Section 1625.2. It thus allows a board to determine a registrant's claim for reclassification on the merits under the guise of determining

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1. In *Robertson v. United States*, 404 F.2d 1141 (5th Cir., 1968), which was cited in the Petition for Certiorari p. 16, the three-judge panel held that the registrant had made out a prima facie case for classification as a minister by presenting evidence that he was working 100 hours per month as a "Vacation Pioneer" and that his sect considered some Vacation Pioneers to be regular ministers. It was the view of the panel that this was sufficient to make out a prima facie case and that in denying the ministerial exemption the board in effect decided the claim on the merits.

On rehearing, the Court en banc reversed on the ground that the evidence submitted prior to the issuance of the order to report for civilian work was not sufficient to make out a prima facie case for classification as a minister. 417 F.2d 440 (5th Cir., 1969). The order to report for civilian work was issued on November 2, 1965. According to the panel, at that time the registrant had presented evidence that he was working 100 hours per month as a minister, and that although his church category was Vacation Pioneer, "there was also evidence that the Jehovah's Witnesses consider some Vacation Pioneers to be regular ministers." 404 F.2d at

that he did not make out a prima facie case, thereby depriving him of the administrative appeal to which he is entitled under 32 C.F.R. Section 1625.13.

C. The Approach of the Court of Appeals for the Sixth Circuit to Judicial Review of a Board's Refusal to Reopen a Classification Is Clearly Erroneous.

It is submitted that the reason why the Court of Appeals for the Sixth Circuit is allowing the board to determine a registrant's claim for classification on the merits under the guise of finding that he did not make out a prima facie case is that its approach to judicial review of a board's refusal to reopen is clearly erroneous. The approach taken by the Court of Appeals for the Sixth Circuit differs from the approach taken by other Courts of Appeal in two very important respects. First, it appears to be applying the same "basis in fact" test applicable to judicial review of a board's final determination on the merits to the review of the board's determination that the registrant did not make out a prima facie case. Second, it holds that the board can, without reopening the classification, engage in evaluative consideration of all the information of the regis-

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1146. The Court en banc took a different view of the evidence, saying that as of that time, he had only been spending 30 to 40 hours per month as a Vacation Pioneer, and that the Watchtower Society did *not* consider Vacation Pioneers to be ministers. It observed that, "Thus, Robertson, a Vacation Pioneer, did not qualify for the ministerial exemption even within the hierarchy of that religious sect." 417 F.2d at 445. It also observed that *none* of the evidence submitted was sufficient to warrant his reclassification. 417 F.2d at 447. Finally, it noted that the written request for classification as a minister was not made until after he had received an order to report for civilian work.

Ibid.

Therefore, while the Court en banc did not dispute the proposition that the board cannot engage in evaluative consideration of the evidence under the guise of reopening the classification, it found that the registrant did not make out a prima facie case for classification as a minister, and upheld the action of the board in refusing to reopen.

trant's file to determine whether the *new facts*, if true, would justify a change in his classification.

As to the first point, the Court of Appeals was of the opinion that "there was a rational basis for the board's determination that Mulloy had not established a case of conscientious objection." In arriving at that conclusion it looked to all the information contained in the petitioner's file and singled out certain information that in its opinion showed that his beliefs were "political, sociological and philosophical rather than religious" and certain information showing that the board could find he was not "sincere" (ignoring the fact that the board assumed he *was* sincere in his beliefs). This is the approach that may properly be taken to judicial review of a merits determination under the "basis in fact test," *Witmer v. United States*, 348 U.S. 375 (1955), but it is totally inappropriate to judicial review of a board's refusal to reopen.

The distinction between the scope of review of a board's final determination and review of a board's refusal to reopen was discussed at length by the Court of Appeals for the Ninth Circuit in *Petrie v. United States*. 407 F.2d 267, 245-5 (9th Cir., 1969). where the Court observed:

> "As applied to an action of the local board in refusing to reopen a classification pursuant to a registrant's request, the basis in fact test is substantially different in degree from that applied to the board's final classification decision. As to the latter action, basis in fact consists of 'some proof'—something which may be less than substantial evidence—to support the *evaluative classification decision* ... In comparison, the Regulations governing reopening ... have been construed to require only that the registrant present to his local board a 'prima facie case' supporting his request for placement in another classification ... Thus, 'refusal to reopen has no basis in fact if the

written request to reopen sets forth a prima facie case for reclassification and if it contains some allegations of fact in addition to those considered when the registrant was originally classified. . . ."

That Court also approved the explanation of the prima facie case test set forth in *United States v. Longworth*, 269 F. Supp. 971, 974 (S.D. Ohio 1967), to the effect that, "the board is mandated into at least looking at the facts as stated, considering whether it has previously known those facts when its prior classification was made and considering whether the facts stated, if true would to *any* reasonable mind, justify a reclassification." And in *Howze v. United States*, 409 F.2d 27, (9th Cir., 1969), the Court posed the test in terms of whether the board *would have* a basis in fact to grant the requested classification on the basis of the information that the registrant submitted.

It is clear that the Court of Appeals for the Sixth Circuit is applying a very different standard for judicial review of a board's refusal to reopen from that being applied by the Ninth Circuit. Since the Sixth Circuit's standard is the same one that it applies to review of a final determination, it is very likely, as in the case at bar, to uphold a refusal to reopen in circumstances where the Ninth Circuit would find that the refusal to reopen would constitute an abuse of discretion. The decisions of the Ninth Circuit in *Petrie v. United States, supra*, and *Howze v. United States, supra,* as contrasted with the decision of the Sixth Circuit in the case at bar, demonstrate this difference, as does the decision of the Seventh Circuit in *United States v. Freeman*, 388 F.2d (7th Cir., 1967).

If the approach of the Sixth Circuit to review of a board's failure to reopen is accepted, *the power of the courts to determine procedural fairness will be no different from their power to determine the substantive validity of the classification.*

Such a result is manifestly unsound. Indeed, the fact that the power of the courts to review the classification on the merits is so limited it necessitates a much more careful review of the board's compliance with the regulations. As pointed out in *United States v. Freeman, supra,* "The procedural framework of the draft classification process and the narrowly limited judicial review available to draft registrants made adherence to procedural safeguards crucial to the maintenance of basic fairness." It is the function of the courts to determine whether the board *has* followed the regulations, not whether there was a basis in fact for their *refusal* to do so.

The Court of Appeals for the Sixth Circuit also stands alone in its holding that in determining whether the registrant has made out a prima facie case for reopening the board can consider and evaluate all the information in the registrant's file against the new evidence which he has submitted in support of his claim. This is contrary to the express language of Section 1625.4, which says that the board shall not reopen if it is of the opinion that the *new facts,* even if true, would not justify a change in the registrant's classification. If the board is to evaluate all the information in the registrant's file, including that previously considered with respect to a claim for another classification, it is necessarily determining the claim on the merits rather than determining whether the registrant made out a prima facie case. All other courts passing on the question have looked only to the evidence submitted by the registrant in support of his claim to determine whether he has made out a prima facie case for reopening. If that evidence is sufficient to make out a prima facie case, the board is required to reopen, *and at that time it evaluates the information submitted against other information in the file.* If it denies the claimed classification on the merits, the registrant is entitled to an administrative appeal, which is denied to him if the board refuses to reopen.

See *Davis v. United States*, 410 F. 2d 89, 93-95 (8th Cir., 1969), *United States v. Freeman*, 388 F.2d 246, 249 (7th Cir., 1967), *Howze v. United States*, 409 F.2d 27, 28 (9th Cir., 1969).

The Court of Appeals attempted to justify the board's evaluative consideration of all the evidence in the file on the ground that the board had the power to investigate and determine whether the facts stated in support of the application for reclassification were true. The government has also argued that the board was justified in refusing to reopen despite the presentment of a prima facie case because the board "had reason to question the truth or sincerity of the representations." (Brief of the United States in Opposition to Certiorari, p. 19). But, as has been pointed out repeatedly, the board accepted everything the petitioner said as true and assumed that he was sincere in his beliefs. (A. 71, 72, 84, 86). There is nothing in the record to show that any board member ever raised a question as to the petitioner's sincerity, which is very understandable, since the board's position was that, "His claim, taking everything, assuming everything he said down there at that time to be so, he still did not make out a case for conscientious objection, and therefore, we saw no reason to reopen the case, because it wasn't there." 412 F.2d at 425.

Assuming *arguendo*, however, that there were doubts as to the petitioner's sincerity this would be the *clearest case* in which a fullscale reopening would be required. The keystone of classification as a conscientious objector is indeed the registrant's sincerity, and as this Court has observed in *United States v. Seeger*, 380 U.S. 163, 175 (1965):

> "Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental question of man's predicament in life, in death, or in final judgment and retribution."

It is inconceivable that the investigatory power of the board under 32 C.F.R. Section 1625.1(c) could be used as a substitute for the reopening of the classification whenever a prima facie case for classification as a conscientious objector has been established. The purpose of that subsection is to enable the board to check the accuracy of *facts*, such as whether a person is enrolled in school, or living with his family, not to make an evaluative judgment as to sincerity of belief.

Very similar to the case at bar, particularly as it relates to the investigative power of the board in connection with a reopening of the classification, is the recent decision of the Fourth Circuit in *United States v. Grier*, 415 F.2d 1098 (4th Cir., 1969). There the registrant, who had been classified I-A, wrote a letter requesting that his classification be changed to III-A (hardship deferment). He stated in his letter that his mother was a mental invalid and that his brother was a student, which meant that his family was primarily dependent upon him for support. He also completed the dependency questionnaire (SSS Form 118), setting forth substantially the same facts. The local board then requested a report on the registrant's family from the county welfare department, which confirmed the statement that his mother was a mental invalid and that she was receiving welfare payments. It next requested that the registrant's brother meet with the board and questioned him about the family's situation. At that time it decided not to grant the deferment. The Court held that the registrant had made out a prima facie case entitling him to a reopening and that the board's "extensive investigation—including the procurement of a report from the county welfare department on the condition of Grier's mother and the holding of a personal interview with Grier's brother"—was, in effect, a reopening of the classification, quoting extensively from *Miller v. United States, supra.* 415 F.2d at 1101. Again, the board had engaged in evaluative

consideration of the claim under the guise of deciding whether to reopen, and its "investigation" was not limited to ascertaining the truth of the factual statements alleged, but was designed to determine whether hardship to the family would or would not result from the induction.

What comes across most clearly in the case at bar is that *there is nothing more the board could have done and no further information it could have considered if it had in fact reopened the classification.* The petitioner presented a prima facie case for reopening based on his answers to the questions contained in the SSS Form 150 and the supporting letters. There may have been information in the file that was inconsistent with the claim of conscientious objection, although it is submitted that an analysis of the file will not reveal any such information. But if there was, it was incumbent on the board to reopen the classification and evaluate the claim on the merits. Instead, under the guise of determining whether the petitioner established a prima facie case, it concluded that he was not a "genuine" conscientious objector. In the circumstances of this case it either abused its discretion by failing to reopen the classification or it reopened the classification in fact without allowing the petitioner the administrative appeal to which he was entitled under the regulations.

D. The Government's Own Arguments, Which Have Shifted at Every Stage of the Litigation, Demonstrate That the Board Either Abused Its Discretion by Failing to Reopen or That It Reopened in Fact.

It is interesting to note how the government has shifted its position throughout this case in an effort to establish that the board neither abused its discretion in refusing to reopen nor did it reopen in fact. At the District Court level, the government argued that the action of the board was justified, since even assuming the petitioner's sincerity (which it said the board did),

he did not make out a prima facie case because he was really seeking an occupational deferment rather than classification as a conscientious objector. It stoutly argued that the board did not reopen the classification precisely because it assumed that the petitioner was truthful in his representations and sincere in his beliefs. On appeal, it added the argument that the petitioner's opposition to war was not based on religious training and belief. In its Brief in Opposition to Certiorari, it reverses itself and argues instead that the action of the board was justified despite the prima facie showing of conscientious objection on the basis of religious training and belief, because the board could find that the petitioner was not sincere. The arguments of the government have come full circle. At first it was argued that since the board assumed the petitioner to be truthful and sincere, it did not in fact reopen the classification. But when the case came before this Court, it was argued that the board found that the petitioner was *not* sincere, so that it was justified in refusing to reopen. Left unanswered is why the alleged finding of insincerity did not constitute a reopening in fact.

The government's own arguments demonstrate conclusively that in the case at bar the line between a reopening in fact and a denial of the classification on the merits following a reopening has become completely obliterated. If the board did not reopen the classification, it was a palpable abuse of discretion, because the petitioner indisputably presented a prima facie case for reopening. It could only deny the classification by evaluative consideration of all the information in the petitioner's file, and such evaluative consideration constitutes a reopening in fact, entitling the petitioner to an administrative appeal. Either way the actions of the board were violative of the regulations and of due process of law. This being so, the conviction of the petitioner, with its concomitant sentence of five years' imprisonment and a fine of $10,000 must be reversed.

II

The Court Below Erred in Its Conclusion That the Petitioner Did Not Make Out a Prima Facie Case for Classification as a Conscientious Objector, Because His Objection to Serving in the Armed Forces Was Based On "Essentially Political, Sociological or Philosophical Views and His Conscience Rather Than on Religious Training and Belief."

A. The Court Failed to Recognize That a Person Whose Religious Beliefs May Cause Him to Engage in Political Activity, Including Resistance to War and Military Service, Is Still Entitled to Classification as a Conscientious Objector so long as His Opposition to War Is, in Part, Based upon Religious Belief.

The primary reason advanced by the board for refusing to reopen was that the petitioner was really seeking an occupational deferment despite the fact that such a request had previously been denied both by the board and by the state appeals board. At the District Court level the government argued that the action of the board, taken on this basis, was justified and did not consitiute a reopening in fact. When the case was appealed however, the government changed its direction, arguing that:

> "Therefore, it is submitted that the basic requirement, 'BY REASON OF RELIGIOUS TRAINING AND BELIEF,' is missing and completely void in the information supplied in support of the registrant's claim of conscientious objection and request for a I-0 classification." (Brief of the United States in *U.S. v. Mulloy*, p. 20).

It concluded:

> "It is submitted that the Court may properly determine that the registrant did not make out a *prima facie* case of conscientious objection to military service on the basis of religious training and belief, that the facts alleged by the appellant, even if true, would not have entitled him to the classification claimed that in view of the appellant's

occupational activities, his status with the law, and his willingness to fight for a cause in which *he* believed, the submission of a claim of conscientious objection was patently frivolous . . ." (*id.* at p. 39).

The Court of Appeals was impressed by the government's argument that the petitioner was not a "religious C.O." and related that argument to the board's view that what the petitioner really wanted was an occupational deferment. It concluded that:

"Mulloy's letter dated November 17, 1967, [it was actually dated November 12, 1967] from which we have quoted indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief. He even indicated at that late date that he had not made up his mind as to whether he would go into the army. The letters which he wrote to the Board revealed that he was principally interested in an occupational deferment." 412 F.2d at 425.

According to the Court of Appeals, then, the board was justified in finding that the petitioner was not a "genuine conscientious objector," because (1) his opposition to war was based on essentially political, sociological or philosophical views and his conscience, and (2) his talking about the importance of his work in Appalachia indicated that he wanted an occupational deferment. It is clear, therefore, that the nature of the petitioner's beliefs, as found by the Court of Appeals, was a crucial element in its decision that there was a "basis in fact" for the board's refusal to reopen.

In *Sicurella v. United States*, 348 U.S. 385, 391 (1955), this Court observed:

"The Court of Appeals also rested its decision on the

conclusion that petitioner's objection to participation in war was only a facet of his real objection to all governmental authority. We believe, however, that if the requisite objection to participation in war exists, it makes no difference that a registrant also claims, on religious grounds, other exemptions which are not covered by the Act. *Once he comes within Section 6 (j), he does not forfeit its coverage because of his other beliefs which may extend beyond the exemption granted by Congress.*" (emphasis added)

Granted that Congress has not chosen to exempt those whose opposition to war is based upon "political, sociological or philosophical views or a merely personal moral code," if one's opposition to war is based in part on religious training and belief, he is entitled to classification as a conscientious objector, although his opposition may be based on other kinds of beliefs, *i.e.*, political, sociological and philosophical, as well.

The present petitioner stated in the answers to SSS Form 150 that his opposition to war was based on religious training and belief and explained how he arrived at that position. (A. 19-22). A letter from a Catholic priest explained how opposition to participation in war was consistent with the teachings of the Catholic Church. (A. 51, 52). However, the petitioner is not a quiet pacifist. To him his religious beliefs meant becoming involved in political action, particularly working among the poor in the mountains of Eastern Kentucky. They meant working against the coal operators and strip-miners and organizing the poor for political power. To the petitioner this was directly related to his religious beliefs. As he stated in his answers to the SSS Form 150:

"As I grew and participated in the world I was able to determine a priority on the things I learned as a child. Thus I place love of my fellow man above regular church

attendance. And I place Thou Shalt Not Kill above An Eye for an Eye. I learned rapidly in my work in the southern Highlands the significance of life and understanding and the futility of violence and force. Too many poor people have been used and walked on by the power hungry courthouse gangs. There is an urgent need for the poor to become organized and the rich to be educated. This must be done in a non-violent way. Violence only breeds violence." (A. 21-22).

As a result of his activities in Eastern Kentucky, the petitioner and others were arrested and indicted on a charge of "teaching sedition" and "advocating the overthrow of the government of Pike County." A three-judge United States District Court found that the prosecution was undertaken at least in part for the purpose of stopping organizing activities in Pike County and enjoined the prosecution under a statute which it found to be unconstitutional on its face. *McSurely v. Ratliff*, 282 F. Supp. 848 (E.D. Ky. 1967).

The petitioner's beliefs also caused him to work against the war. As he stated in his SSS Form 150 in response to the question, "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions:"

> "I have supported peace demonstrations to end the war in Vietnam. I have written letters to my Senators and signed a petition to President Johnson urging a negotiated peace in Vietnam." (A. 22).

Following his "courtesy interview" with the board, he wrote a letter saying that he expected that the board would draft him "regardless of my feelings." At that time he stated that he had not made up his mind what course he would follow. He then stated:

> "If I decided to go into the Army I will, of course, do

everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think. . . ." (A. 59).

According to the Court below, it was this letter that "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F.2d at 425.

By so holding the Court failed to recognize that a person whose religious beliefs may cause him to engage in political activity, including resistance to war and military service, is still entitled to classification as a conscientious objector so long as his opposition to war is, in part, based upon religious training and belief. The Court focused on the petitioner's political activity and ignored his statements of religious belief and the letters submitted in support of its claim. In so doing, it disregarded the test set forth by this Court in *Sicurella v. United States, supra.*

There is the real danger that the Court below may appear to be saying something else, namely that once a registrant engages in "political activity," particularly opposition to the war and the draft, he forfeits the claim that his beliefs are "religious." The "religious conscientious objector" then is defined as a person who does not "resist the system," but "quietly holds to his views." But the person whose religious beliefs cause him to actively resist war and conscription will be found to be a "political" rather than a "religious" conscientious objector.

The decision of the Court below with respect to the "essentially political, sociological or philosophical" opposition

to war on the part of the present petitioner is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *Fleming v. United States*, 344 F.2d 912 (10th Cir., 1965). There the Court held that although the registrant might have been influenced more by sociological and philosophical views rather than by religious beliefs, since he had been influenced in part by religious training and belief, he was entitled to classification as a conscientious objector. The Court stated:

> "As we read the Seeger case, it clearly lays down the rule that before a conscientious objector classification may be denied on the ground that the applicant's beliefs are based upon 'political, sociological, or philosophical views or a merely personal moral code,' those factors must be the *sole* basis of his claim for the classification . . .
>
> The entire record clearly shows that his beliefs are, in part at least, based upon religious convictions. It may be true that appellant has been influenced, in the words of the hearing examiner '*** more by sociological and philosophical views than by religious beliefs or the dictates of a deity.' But it is also clear that he has been influenced by religious training and belief. Therefore, Fleming comes clearly within the definition of a "conscientious objector . . ." 344 F.2d at 916.

The record in the case at bar also clearly shows that the present petitioner has been influenced, at least in part, by his religious training and belief. The fact that for him, religious belief reflects itself in political activism, and that he cannot sharply distinguish between his religious belief and "political, sociological or philosophical views and his conscience" does not cause him to forfeit his claim to classification as a conscientious objector.

Likewise the fact that the petitioner had worked with the

poor and wanted to continue such work could not be interpreted to mean that he was not a "genuine C.O." and that what he really wanted was an occupational deferment. By seeking classification as a conscientious objector he necessarily agrees to perform civilian work contributing to the maintenance of the national health, safety and interest, as is stated on the face of SSS Form 150. Presumably anti-poverty work would qualify as appropriate civilian work, constituting "a charitable activity conducted for the benefit of the general public or carrying out a program for the improvement of the public health or welfare." 32 C.F.R. Section 1660.1. The petitioner *did indeed* talk about his work with the poor. In response to the question on SSS Form 150, "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions, the petitioner stated:

> "I am spending my life non-violently working among the poor. When I helped organize Jink Ray's resistance to strip mining, I urged non-violent methods. I was successful and violence was averted in a very tense situation." (A. 22).

He described at length his work among the poor and related this to his religious beliefs and his opposition to war. (A. 21,22). And in his letter of November 12, 1967, he related the problems of poverty to war, particularly the present war in Vietnam. (A. 58-59).

The petitioner stated his beliefs as best as he was able. These beliefs were reflected in his work among the poor as well as in his opposition to war. To imply that by stressing his work among the poor, he "waived" his claim to conscientious objector status and converted that claim to one of occupational deferment is the height of sophistry. As this Court observed in *Simmons v. United States,* 348 U.S. 397, 404, n. 5 (1955), "Registrants are not to be treated as though they were engaged

in formal litigation." At the time of his request for a reopening, the petitioner was a young man of twenty-three years, not learned in the intricacies of the law and not represented by counsel. He was seeking status as a conscientious objector and should not be denied that status because his religious beliefs were reflected in his opposition to war and in his desire to continue his work among the poor.

The conclusion of the Court below that the petitioner's opposition to war was based on "political, sociological and philosophical views and his conscience rather than on religious training and belief" caused it to commit error in two important aspects. First, it sustained the board's determination that what the petitioner really wanted was an occupational deferment. Since the Court's reasoning was that a "political activist" could not be a "genuine conscientious objector," and since the petitioner had stressed the importance of his work among the poor, the Court found a "basis in fact" for the board's determination as to the character of the petitioner's request. Secondly, the Court's conclusion as to the nature of the petitioner's beliefs furnished with an independent ground for finding a "basis in fact" for the board's action. Apart from the Court's erroneous application of the basis in fact test to a request for a reopening, as discussed previously, its decision on the question of "religious" versus "political, sociological or philosophical" belief, which caused it to sustain the board's action, is patently erroneous. *Sicurella v. United States, supra; Fleming v. United States, supra.*

B. Congress May Not Constitutionally Limit the Conscientious Objector Exemption to Those Whose Opposition to War Is Based Upon Religious Training and Belief.

Petitioner has maintained throughout these proceedings that his opposition to war was based upon conventional religious training and belief, namely the teachings of the Catholic Church

and Jesus Christ. The Court below, quoting from petitioner's letter to his board of November 12, has taken the position that his objection to serving in the Armed Forces was based upon "essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." It was never suggested by the board, the government or the Court that the petitioner was not opposed politically, philosophically, as a matter of conscience or otherwise, to participation in war. Therefore, if it is concluded that the petitioner did not make out a prima facie case of conscientious objection on the basis of religious training and belief, it cannot be denied, particularly in view of the great weight that the Court attached to his letter of November 12, that he *did* make out a prima facie case of conscientious objection on the basis of "political, sociological or philosophical views and his conscience."

In *United States v. Sisson*, No. 305, this Term, and *Welsh v. United States*, No. 76, this Term, the Court will consider whether Congress may consistent with the First Amendment, limit the conscientious objector exemption to those whose opposition to war is based upon religious training and belief. If the Court decides that Congress may not constitutionally do so, that decision will require a reversal of the petitioner's conviction, for although the petitioned has maintained that the basis of his opposition to war *was* religious training and belief, the Court below—and implicitly the board—found that it was not.

Since the issue has been briefed and argued extensively in those two cases, there is little that can be added here. It should be pointed out, however, that the petitioner's case does demonstrate the patent unsoundness of the distinction between "religious" and "non-religious" conscientious objection. The petitioner's opposition to war has not been disputed at any point in the proceedings. But because he is a "political activist," as viewed by the Court below, he has been denied classification as

a conscientious objector on the ground that his opposition to war is non-religious. In an effort to obtain the classification the petitioner has attempted to delineate his religious beliefs and to distinguish them from his "political, sociological and philosophical beliefs and his conscience." As the action of the Court below indicates, this may be a practical impossibility.

III.

The Fact That the Petitioner Was Denied the Opportunity for Full Review of His Claim for Classification as a Conscientious Objector, Including Review by an Appeals Board, When Such Claim Was Presented for the First Time, Constitutes a Violation of Due Process of Law, as Guaranteed by the Fifth Amendment.

In holding that the board neither abused its discretion in refusing to reopen the petitioner's classification nor that it reopened the classification in fact, the Court below allowed the board to engage in evaluative consideration of the petitioner's claim on the merits. It is the contention of the petitioner, of course, that such evaluative consideration, under the guise of finding that the petitioner did not make out a prima facie case, is impermissible and requires a reversal of his conviction. But if it should be held that such evaluative consideration is permissible and does not constitute a reopening, then it is submitted that the denial of a full review that results from the board's summary dismissal of a claim presented for the first time is discriminatory and violative of due process.

Whenever a board summarily dismisses under 32 C.F.R. Section 1625.4 a claim that has been made for the first time, the registrant will never have had his claim reviewed by an appeals board. At the same time registrants whose claim was made at the time of the original classification or whose

classification was reopened and their claim denied on the merits do have the right of appeal. However, all three registrants have presented their claims for the new classification, here conscientious objector status, for the first time after the facts entitling them to such status have matured. To allow two of them to appeal while denying the right of appeal to the third, it is submitted, constitutes impermissible discrimination, "so unjustifiable as to be a denial of due process." *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Schneider v. Rusk*, 377 U.S. 163 (1964).

It is not contended that due process requires that there be an appeal from the board's refusal to reopen the classification in all cases. *United States v. Beaver*, 309 F.2d 273 (4th Cir., 1962), *cert. denied*, 371 U.S. 951 (1963); *Klubnikian v. United States*, 227 F.2d 87 (9th Cir., 1955), *cert. denied*, 350 U.S. 975 (1956). What is contended is that where a claim for a particular status has been made for the first time, and that claim is not on its face "clearly frivolous," the registrant must be permitted to appeal from the board's refusal to recognize that claim. The right to appeal cannot be the subject of invidious discrimination. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). This should be equally true of administrative appeals. Since registrants whose claim was made at the time of their original classification have the right to appeal, as do registrants whose classification was reopened and the claim denied on the merits, the right to appeal cannot be denied to a registrant who has likewise presented a claim for the first time. This is what occurs where the board refuses to reopen on the ground that the registrant has not made out a prima facie case—particularly, where as here, the board is permitted to engage in evaluative consideration of the registrant's entire file in order to determine whether he has made out a prima facie case.

Directly in conflict with the decision of the Court below on

this issue (the Court below disposed of the issue by saying that "other claims of error are insufficient to warrant reversal") is the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States,* 388 F.2d 973 (9th Cir., 1967). In holding that a local board could not cut off a registrant's appeal rights by refusing to reopen under Section 1625.4 when it had, in fact, "engaged in a general consideration and evaluation of the claim," the Court first observed that such action "could not be harmonized with the provisions and purposes of Section 1625.2 and 1625.11." It went on to hold that if such power existed, the action of the board would be discriminatory and violative of due process. The Court stated:

> "But if such an implied power can be regarded as being intended to exist under the regulations, then it must be held, we think, that the discrimination which the board effects against a conscientious objector claimant by dealing with his situation on this basis, as opposed to another such claimant of similar prima facie situation to whom it accords a reopening, would be a violation of the due process clause of the Fifth Amendment.
>
> In the latter situation, a conscientious objector claimant would be left with the procedural rights to appear, be heard, and take an appeal, while in the first situation there would be a foreclosure of these substantial incidents to a similar claimant. For a local board to be able to effect a discrimination of such substance between prima facie situations of legal equality would seem to us to constitute a matter of basic unfairness and hence to be, in the language of *Bolling v. Sharpe* and *Schneider v. Rusk*, 'so unjustifiable as to be violative of due process'." (citations omitted) 388 F.2d at 976-977.

It is because of this discrimination between "situations of prima facie legal equality" that the power of the board to

engage in evaluative consideration under the guise of refusing to reopen should not be recognized. But if such power is recognized as it was in the Court below, then it is submitted that the exercise of that power in the circumstances of the present case is violative of due process of law.

IV.

The Petitioner Was Denied Due Process of Law, as Guaranteed by the Fifth Amendment, in That His Claim for Classification as a Conscientious Objector Was Not Given Full and Fair Consideration by His Selective Service Local Board.

A. The Members of Petitioner's Board Refused to Give Full and Fair Consideration to His Claim, in Particular, By Refusing to Read with Some Care His Detailed Answers to SSS Form 150.

The right to a full and fair hearing that is an essential ingredient of administrative due process, *Morgan v. United States*, 289 U.S. 468 (1936), applies with equal force to a hearing by a selective service local board. *Bejelis v. United States*, 206 F.2d 354 (6th Cir., 1953). The petitioner is contending that the members of the local board are required to read a registrant's file with some degree of care before rendering its decision on his classification, and that when there is a claim for classification as a conscientious objector, that reading includes as a minumum, the detailed answers to SSS Form 150.

It seems agreed that the petitioner's "courtesy interview" with his local board on November 9, 1967 lasted about ten minutes. (A. 77, 82). What stands out from the record is that the petitioner's file, particularly his SSS Form 150 was not carefully examined by *any* member prior to the meeting, or at any time thereafter. The testimony of the board members

demonstrates this most clearly. Board member Downes testified as follows:

Q. Prior to the meeting did you read his file, his Selective Service file?

A. The file is available before he presented himself, yes.

Q. And you read it?

A. I scanned it because I am the newest member on this particular board *and I was not familiar with what was in his file at all.* (emphasis added).

* * * * * *

Q. Do you know if, when you went through Mr. Mulloy's file, did you find that he had completed the SSS Form 150?

A. I couldn't say.

Q. You don't remember that?

A. No, because as I recall his file was fairly thick.

Q. Fairly thick.

A. And I'm not familiar with the various forms by their particular numbers.

Q. Well, you knew though that applicants for Conscientious Objector status must complete a special form; is that correct?

A. Yes.

Q. Did you read, then, the form that he had filled out, his form for classification as a Conscientious Objector?

A. I don't remember." (A. 74, 75).

Board member Wolking testified that he read the file, but he did not specifically recall having gone through it nor did he recall how much time he spent on it. His conclusion was that the petitioner was asking for conscientious objector status because "he had important work in Eastern Kentucky." (A. 84). Board member Rickert, who was not present at the November 9th "interview" but who voted, nonetheless, at the January 11th

meeting; at first testified that he had not read the petitioner's responses to SSS Form 150. (A. 87, 88). He then said that he looked at the file before the meeting of January 11. (A. 88).

Board chairman Sherman testified that the board members "looked over his file before he came in as we do anybody else." (A. 91). Board member Downes corroborated that the only kind of consideration of the file was that which took place, if at all, immediately preceding the "interview," stating:

"A. At that time, the clerk said that an individual was waiting—was there, and all of the board members, I believe, or those who cared to look in his file, but as far as reading each separate sheet is concerned, I don't believe that I did this."

Q. * * * * I am concerned about what we call the SSS Form 150 which is the special form for Conscientious Objectors that all applicants must complete. You don't recall reading that?"

A. Not specifically." (A. 77).

He also testified that "the only time I would have had an occasion to even consider the file would have been during one of the Board meetings or before the meeting started." (A. 81). His decision was based, he said, "on the basis of what was discussed, what we were able to glean from his own statements." (A. 81).

It is clear that petitioner's claim for classification as a conscientious objector was considered in a very superficial manner. No board member went through the file thoroughly, reading and analyzing the detailed answers he gave to the questions contained in SSS Form 150. The file was "scanned" or "looked at," if at all, only immediately preceding the interview with the petitioner, and it is not clear that this "scanning" even included looking at the SSS Form 150. During the brief interview no questions were directed to the content of

SSS Form 150. In fact the board members did not recall asking any questions at all. (A. 77, 82). Then the members met for about ten minutes and decided that "the new facts, even if true, did not entitle him to classification as a conscientious objector."

It is submitted that the above clearly demonstrates that the board did not give full and fair consideration to the petitioner's claim. At a mimimum the board members were required to *read* the answers to the detailed questions contained in SSS Form 150, if not his entire file. Careful consideration—or at least reading—of the pertinent information in the registrant's file, particularly the information relative to the classification that he was claiming, would seem to go to the essence of administrative due process. In *Zenith International Film Corp. v. City of Chicago*, 291 F.2d 785 (7th Cir., 1961), it was held that the owner of a film declared to be obscene had been deprived of a full and fair hearing because administrative officials had failed to view a film in its entirety before declaring it to be obscene. The same reasoning would dictate that a board should be required to read a registrant's entire file, or at least his answers to the SSS Form 150, before concluding that the new information submitted, even if true, would not entitle the registrant to classification as a conscientious objector.

It may be objected that the board is "very busy" and that it cannot review the file of each registrant thoroughly. But the right to a full and fair hearing is a matter of due process, so that it cannot be compromised "on the footing of convenience or expediency." *Ohio Bell Telephone Co. v Public Utilities Commission of Ohio*, 301 U.S. 292, 305 (1937). It would also seem that due process should not depend on whether the members of the administrative tribunal receive compensation for their services.

Realistically, no board's caseload is such that it is unable to

give full and fair consideration to those cases where careful deliberation is required. The great majority of cases coming before a local board will be routine. Where a registrant has presented no evidence entitling him to a different classification, he is classified as 1-A. 32 C.F.R. Section 1622.10. A number of classifications entitling a registrant to deferment, such as II-S, are also routine, because the statute and regulations clearly spell out the conditions. See, *e.g.* C.F.R. Section 1622.25. Requests for classification in class 1-O will be fairly rare in relation to the board's total caseload. When such a request is made, the board may properly be expected to give it detailed and careful consideration.

If a board is not required to give such consideration to a request, if it is not at least required to read the SSS Form 150 of a registrant who has claimed classification as a conscientious objector, the registrant is put in a very difficult and unfair position. Judicial review of his substantive classification is extremely limited, and has been described as "the narrowest known to the law." *Blalock v. United States,* 247 F.2d 615, 619 (4th Cir., 1957). If the board is permitted to engage in the kind of superficial "scanning" that occurred in the case at bar, and then conclude that a prima facie case was not established, *at no time in the administrative and judicial process will the merits of the registrant's claim have been considered fully.* The present petitioner gave detailed answers to the questions contained in SSS Form 150. The board members could not testify that they gave careful consideration to those answers, and some did not remember even "scanning" them. The Courts, operating under the "basis in fact" test, cannot evaluate the answers on the merits. Unless the board members are required to *read* his answers and carefully consider them, his completion of the form turns out to be meaningless. The petitioner now faces a sentence of five years' imprisonment and fine of $10,000

because the board found that he did not make out a prima facie case for classification as a conscientious objector. And it arrived at that decision by a "scanning" of his file by some members only and a ten minute interview. Surely this cannot be considered due process of law.

B. The Members of Petitioner's Board Lacked a Minimum Understanding of the Applicable Statute and Regulations, and Thus Were Unable to Pass Intelligently on His Claim for Classification as a Conscientious Objector.

It has been observed that in regard to the draft law, "probably no provisions have been examined more closely than those relating to the deferment of conscientious objectors." *United States v. Gearey*, 368 F.2d 145, 146 (2nd Cir., 1966). And yet it is doubtful whether the members of the petitioner's board had any more than the vaguest understanding of the applicable statute and regulations in regard to that classification. This is not surprising, since the clerk of the board testified that in her seventeen years with the Board, *no registrant had ever been assigned to civilian work as a conscientious objector.* (A, 74). The testimony of the board members concerning their understanding of the applicable statute and regulations is most revealing. In response to the question of whether he was "thoroughly familiar with the regulations governing classification of conscientious objectors," board member Downes testified:

> "I can't say that I'm thoroughly familiar. As I indicated to you before, I am perhaps the youngest person on the particular board."

He then stated that he had an understanding of "what a conscientious objector is" in a general sense. This was:

> "Well, it is my understanding that if a person declares that he is a conscientious objector that rather than going into the military he could serve in some other capacity."

If a registrant could obtain conscientious objector status simply by "saying" that he is one, the present petitioner would not now be under a sentence of five years' imprisonment. The dialogue continued:

> Q. Well, the draft Board has to make that decision, doesn't it? He can't just do it on his own.
>
> A. The draft Board, I thought now, was involved primarily with determining the availability of people." (A. 78).

Board member Wolking did not know what classification was to be given to conscientious objectors. He also seemed to think that by signing SSS Form 150 the petitioner stated that he would *not* perform civilian service in the national interest. (A. 85, 86). Board Chairman Sherman, an attorney, was completely confused regarding the distinction between classification in Class 1-O and classification in Class 1-A-0. He did not know if the board could classify a person as qualified for noncombatant service only, and thought that if the board found that the petitioner was a conscientious objector, he would be classified in Class 1-A-0. (A. 90, 91). His understanding of a conscientious objector was "one who has conscientious scruples against taking another person's life even under any circumstances." (A. 90). This, of course, is not the definition given in the statute, which is based upon opposition to particiapation in *war* in any form, and one who would take human life in self defense may still be classified as a conscientious objector. *Taffs v. United States*, 208 F.2d 329 (8th Cir., 1953), *cert. denied*, 347 U.S. 928 (1954).

The foregoing makes it abundantly clear that the board members had little or no understanding of the law governing the petitioner's claim for conscientious objector status. Administrative agencies, including selective service local boards, are deemed to have "expertise" in the law they are administering. The petitioner's local board not only lacked such "expertise"

when it came to determining a question of conscientious objection, but clearly demonstrated administrative incompetence.

To allow a board so constituted to dispose of petitioner's request in itself amounts to a denial of due process of law, since the members of the board were not capable of making a reasoned and informed decision.

CONCLUSION.

For the reasons stated herein, it is respectfully submitted that the judgment of the Court below should be reversed and the conviction of the petitioner be set aside.

Respectfully submitted,

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APPENDIX A

Pertinent Text of Statute Involved

Military Selective Service Act of 1967
[50 App. U.S.C. Section 451 et seq.]

50 App. U.S.C. Section 456 (j)

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and beliefs" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title.

50 App. U.S.C. Section 462 (a)

Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not

more than five years or a fine of not more than $10,000 or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Pertinent Text of Regulations Involved

Selective Service Regulations
[32 C.F.R. Ch. XVI]

Part 1625–Reopening and Considering Anew Registrant's Classification.

Reopening Registrant's Classification

1625.1. Classification Not Permanent.–(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally re-examined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

1625.2 When Registrant's Classification May Be Reopened and Considered Anew.–The local board may reopen and consider anew the classification of a registrant (a) upon the

written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

1625.3 When Registrant's Classification Shall Be Reopened and Considered Anew.—(a) The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant.

(b) The local board shall reopen and consider anew the classification of a registrant to whom it has mailed an Order to Report for Induction (SSS Form 252) whenever facts are presented to the local board which establish the registrant's eligibility for classification into Class 1-S because he is satisfactorily pursuing a full-time course of instruction at a

college, university, or similar institution of learning.

1625.4 Refusal To Reopen and Consider Anew Registrant's Classification.–When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required.

Classification Anew

1625.11 Classification Considered Anew When Reopened.–When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

1625.12 Notice of Action When Classification Considered Anew.–When the local board reopens the registrant's classifi-

cation, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form 110) to the registrant and on Classification Advice (SSS Form 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

1625.13 Right of Appeal Following Reopening of Classification.—Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1625.14 Cancellation of Order to Report for Induction or for Civilian Work by Reopening of Classification.—The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply.